FOLEY & LARDNER
WASHINGTON HARBOUR
3000 K STREET, N.W., SUITE 500
WASHINGTON, D.C. 20007-5143
202.672.5300 TEL
202.672.5399 FAX
www.foley.com

WRITER'S DIRECT LINE
202.295.4715
psullivan@foley.com EMAIL

CLIENT/MATTER NUMBER
999700-0601

February 27, 2004

Peter G. Blumberg, Esq.
Federal Election Commission
Office of the General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Re: Proposed Statement of Policy Regarding Naming of the Treasurers in Enforcement Matters

Dear Mr. Blumberg:

In response to the Commission's notice published in the Federal Register[1] entitled Proposed Statement Of Policy Regarding Naming of Treasurers In Enforcement Matters ("Treasurer Policy"), I am pleased to submit the following comments.

INTRODUCTION

The regulated community, and especially those who serve in the capacity as treasurers of political committees, should welcome the Commission's efforts to clarify the various matters set forth in the Treasurer's Policy.

The concept of "personal liability" of a political committee's treasurer has been somewhat clouded over the years for a couple of reasons. First, but for those clear situations in which the person serving as treasurer is alleged to have violated the FECA based on a factual pattern separate and apart from his capacity as serving as treasurer (e.g. making an excessive contribution to a committee), the perception is that the treasurer is a named party in an enforcement matter only in his "official capacity." Second, this perception has been perpetuated by the failure to name the treasurer in a personal capacity along with the political committee and the treasurer in his official capacity in those situations in which the Commission claims it is able to do so. The clearest example is the situation for the failure to file disclosure reports.[2]

[1] Notice 2004-3 F.R. Vol. 69, No. 18, Wednesday, January 28, 2004, pp. 4092-4095.

[2] The Treasurer Policy states under subsection IV, that, "The Act places a certain legal obligation on committee treasurers, the violation of which makes them personally liable. See, e.g., …434(a)(1)(file and sign reports of receipts and disbursements)." See also 2 U.S.C. § 434(a); 11 CFR § 104.1(a). In both the Act and the Regulations, the obligation for filing reports of receipts and disbursements is placed upon the treasurer. The failure of the Commission to routinely name the treasurer in his/her personal capacity, in addition to the political committee and the treasurer in his official capacity, has added to the misunderstanding within the regulated community about a treasurer's personal liability.

My comments presented below are both of a procedural and a substantive nature. They are offered with the recognition that this is a serious item for the Commission to consider and a one fundamental to the everyday operations of federal committees under the FECA.

A. <u>Due to the fundamental importance of the matters contained in the Treasurer's Policy, this matter should move forward as a rulemaking rather than a policy change by the Commission</u>.

As noted in my introductory comments, the administrative duties and the potential personal liabilities of a treasurer, raise issues fundamental to the operation of political committees under the FECA. A treasurer is the only "officer" or "representative"[3] required for purposes of registering a political committee. A political committee is prohibited from accepting contributions or making disbursements if the office of treasurer is vacant.[4] There is little debate that the position of treasurer is critical to the function of a federal political committee and the potential liability, is dramatically underscored by the issues noted in Section IV of the Treasurer's Policy.

Too often, the position of treasurer is viewed as merely a tichsler head of a political committee there to execute documents without a full appreciation of the potential liability and responsibility associated with the office. I fully appreciate that it is the treasurer's responsibility to undertake sufficient due diligence to gain knowledge and a full appreciation for the responsibilities, duties, and liabilities associated with the position of a treasurer of a political committee. However, I submit, notice of those liabilities is best set out in the Commission's Regulations.

The Treasurer Policy amend the previous policies adopted by the Commission in 1983 and 1984 related to these subjects.[5] As a procedural point, I would propose that the memorialization of these policies for treasurer liability should be captured in the Commission's Regulations not merely in the Commission's policies.

The major distinction is one of notice to the regulated community, especially those contemplating assuming the role of a treasurer. The Regulations provide the appropriate platform to clearly and concisely set out the responsibilities and potential liabilities of a treasurer. The regulated community relies primarily upon the statute (2 U.S.C. § 431 et seq.), the Commission's Regulations (Title 11, Code of Federal Regulations)) and the Advisory Opinion of process (2 U.S.C. § 437(f)), for compliance guidance.

The Regulations offer the best vehicle to most clearly and succinctly provide the regulated community with notice of the treasurers' obligations and personal liabilities. Commission policy statements, are not readily known to the general public nor are the resources that the regulated

[3] 2 U.S.C. § 432(a). Though the FEC Statement of Organization requires the naming of a "custodian of records" the record-keeping obligations fall upon the treasurer. 2 U.S.C. § 432(c).

[4] 2 U.S.C. § 432(a).

[5] <u>See</u> Federal Election Commission Agenda Document 83-119; No. 84-79.

community would readily look to for guidance in this area. When assessing whether or not to assume the role of a treasurer for a political committee, a person will far more often than not undertake due diligence to review the Act, Regulations and advisory opinions, not Commission policies.

For those reasons, in order to provide the broadest and clearest notice to the community regarding treasurer responsibilities and obligations, I would respectfully submit that the Commission consider undertaking this treasurer liability process through a notice of rulemaking in lieu of the use of an amended Commission policy statement.

B. <u>The proposed policy as set forth in the Treasurer Policy is helpful, however, it needs to be expanded to be more detailed regarding liability issues</u>.

As a general matter, I concur with the proposed Treasurer Policy as set forth by the Commission. Specifically, enforcement actions that are brought against a political committee as an entity, should only reference the treasurer in his or her official capacity as treasurer. Similarly, clear notice should be indicated when a treasurer has potential personal liability. The following are qualifications to this general view of support.

<u>Official Capacity of Treasurer</u>

I support the inclusion of the phrase "official capacity as" as a preface to the term "treasurer" which traditionally is the only identification attributed to the individual named. By adding that additional language, it is clear to the public and the treasurer that there is no personal liability attributed in the findings by the Commission. As will also be noted below, this classification should also provide notice that from the commencement of an enforcement proceeding, the treasurer will have no personal liability for the payment of civil penalties assessed against the political committee.

However, I would raise for the Commission's consideration the point and time when the treasurer's name is included in the enforcement matter record. The naming of the treasurer in his or her official capacity is clearly for ministerial purposes. The Treasurer Policy states that specifically naming the treasurer as opposed to simply referencing the office of the treasurer, provides the Commission with an individual upon whom to serve notice throughout the proceedings and provides more accountability on behalf of the committee, namely to ensure that the committee is responsive to the Commission's findings.[6]

The Commission should consider utilizing the treasurer, when named in their official capacity, in a fashion similar to a registered agent for service for incorporated entities. In those situations, the agent is the person registered to accept service and to receive notices on behalf of the corporation albeit a position that does not imply nor connote any liability related to the notices it receives and serves on behalf of its client.

[6] Treasurer Policy, Section III.

Similarly, in this situation the Commission's original 1983 policy was largely adopted to make certain that there was a "live body" eligible to receive notices, especially in situations where the principals forming the committee had disbanded and it was difficult to identify anyone to receive notices from the Commission regarding potential enforcement matters. Naming the treasurer as an agent for services, accomplishes the Commission's ministerial needs yet avoids the potential adverse impact upon a person's reputation by listing the treasurer by name.

Though the ability to properly serve a committee with Commission notice is a necessary ministerial function, it is not one that mandates that the treasurer's name be included in documents that will subsequently be made available to the general public.

Contrary to the position taken in the Treasurer Policy, I would submit that the Commission should merely name the position of treasurer without inserting the specific individual's name. In that situation it becomes clear that the treasurer is not a party to the action nor "personally liable" for the payment of any civil penalties assessed against the committee. Yet, the event a *de novo* action is filed in Federal District Court, the treasurer would have properly been notified during the administrative action and therefore able to be named in the *de novo* litigation without being able to raise an affirmative defense that the treasurer was not properly noticed during the administrative process.

In the overwhelming number of enforcement cases, the treasurer is not named in a personal capacity but rather in his or her official capacity. As noted in the Treasurer Policy, this does present confusion and concern to anyone being named in a government investigation. These concerns could be greatly mitigated by merely referencing to the office of treasurer without naming the individual specifically. Secondly, such a system still enables the Commission to fulfill its primary purpose for naming the treasurer; the ministerial purpose of being able to serve papers upon a specific individual. For those reasons, I would submit that the Commission delete the specific name of any individual as treasurer when the treasurer is named in his or her official capacity.

In addition, the Treasurer Policy should include an affirmative statement that the treasurer, when named in his or her official capacity, is not personally subject to the payment of any civil penalties in the event the political committee has insufficient resources to pay civil financial penalties. The treasurer would still have an obligation to comply with injunctive relief that may be negotiated in the conciliation agreement with the Commission or as a result of a court order resulting from litigation. An affirmative statement related to this liability issue would clearly set out notice of those areas of the FECA for which the treasurer has potential personal financial exposure and those areas in which they do not have such exposure.

As a side note, there is a potential corporate liability issue that surfaces relative to assessing personal liability to the treasurer when a treasurer is merely named in his or her official capacity. A vast majority of authorized and non-connected political committees are currently incorporated as is permitted by the regulations for liability purposes.[7] In those situations, the

[7] 11 CFR § 114.12.

treasurer of the political committee serves in that capacity as treasurer of the corporate entity. Without getting into an extensive discussion of profit, or not-for-profit corporate liability issues, as a general rule, the officers of the corporated entity are insulated by the "corporate veil" from personal liability, for the payment of civil penalties assessed against the corporation when the corporate officer is named in his/her official capacity. Conversely, if the corporate officer is alleged to have personally violated the law, the "corporate veil" will not provide the insulation and protection against prosecution and the payment of civil or criminal penalties.

In order to avoid that defense from being raised and more importantly to clarify the matter, the Commission should make an affirmative statement that the treasurer is not personally liable for the payment of any civil penalties assessed against the incorporated political committee in those situations in which the treasurer is merely named in the his or her official capacity.

Personal Liability of a Treasurer.

As noted in the Treasurer Policy, the Commission has identified a number of situations in which the treasurer is eligible to be named in his or her personal capacity for failure to comply with obligations imposed upon the treasurer or in those situations in which the treasurer is alleged to have violated provisions of the Act.

As noted above, the Commission should identify, in this Treasurer Policy, those unique provisions for which the treasurer could be named in his or her personal capacity as a result of being treasurer for committee. Examples of these would include those noted in Section IV of the Treasurer Policy, namely the failure to timely file reports, failure to properly maintain records, the failure to timely deposit receipts, etc. Once again, the basis for this recommendation is to clearly set out the obligations and more importantly the personal liabilities that the Commission attributes to the position of treasurer.

Currently, there is an ignorance in the regulated community that the treasurer is subject to personal liability for the failure to carry out these duties. Treasurers overwhelming view this as an obligation of the committee and that they are merely acting in the ministerial fashion and not subject to any personal liability for civil penalties. Such notice and clarification would be a benefit to all.

As a collateral point, in those situations in which a treasurer is named in his or her personal capacity, a separate Reason To Believe ("RTB") finding (2 U.S.C. § 437(g)(a)) should be issued to the treasurer individually and not merely lumped together with the RTB finding against the political committee.

In those situations, there may clearly surface a conflict of interest between the position of the treasurer in his/her personal capacity and that of the political committee. Segregating the RTB findings with separate factual and legal analysis more clearly identifies and segregates the liability of the treasurer as distinguished from that of the political committee.

CONCLUSION

Attempts by the Commission to clarify the treasurer's liability in his or her official capacity contrast with that of the treasurer's personal liability is one of great importance to the regulated community. It is for that reason, that I submit that the Commission should undertake a notice of proposed rulemaking in this arena and seek further comment on the structure and many of the issues I have raised above. The issues raised herein are certainly not exhaustive and a rulemaking procedure would highlight the issue for the regulated community and generate the type of input that I believe the Commission should review for this particular matter.

I appreciate the Commission's invitation to receive these comments.

Respectfully submitted,

Paul E. Sullivan, Esq.
Foley & Lardner